

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEANDRA LAVELL CHOICE,

Defendant-Appellant.

UNPUBLISHED

April 8, 2014

No. 313415

Saginaw Circuit Court

LC No. 12-036865-FC

Before: STEPHENS, P.J., and SAAD and BOONSTRA, JJ.

PER CURIAM.

Defendant, via counsel and a Standard 4 brief, appeals as of right his jury trial convictions of assault with intent to murder, MCL 750.83, felon in possession of a firearm, MCL 750.224f, and two counts of possession of a firearm during the commission of a felony (felony-firearm), second offense, MCL 750.227b. We affirm.

On the night of the offense, one of the victims, John Robinson, was engaged in an argument with his then girlfriend, Toni Samaniego. In the course of their argument he took her car and ultimately parked it a few blocks from the home the two shared. As he was walking back to the house to get his belongings, he and the other adult victim, Tristan Hicks, encountered one another. Robinson and Hicks continued walking toward the house when Robinson saw an angry Samaniego in her automobile accompanied by some girlfriends. Robinson and Samaniego resumed their verbal disagreement and the other women went to a house nearby. Several men approached Hicks and Robinson in a hostile manner from the house to which the women had entered. The defendant was seen first brandishing and then firing a weapon. Hicks and Robinson ran and hid behind a car. The defendant continued to shoot, hitting a minor, JS, behind whose father's car, Hicks and Robinson were hiding.

Several persons identified defendant as the perpetrator. Hicks, who knew the defendant from the neighborhood, identified him from a photo array. Robinson also identified defendant as the perpetrator. Robinson testified that he and defendant grew up in the same neighborhood and that he often saw defendant in the area where Samaniego lived. Samaniego identified defendant as a possible shooter at trial but admitted she did not see him with a gun or see the shots fired. Krystle Louis, the defendant's girlfriend, spoke to the police after the incident and signed a statement, which she later claimed was the product of coercion, where she alleged the defendant had admitted firing the shots at Hicks and Robinson.

The jury acquitted defendant of one count of assault with intent to murder and one count of felony-firearm, but convicted him of one count of assault with intent to murder, felon in possession of a firearm, and two counts of felony-firearm, second offense. The trial court sentenced defendant as a fourth habitual offender, MCL 769.12, to prison terms of 40 to 60 years for assault with intent to murder and felon in possession of a firearm, and five years for felony-firearm, second offense.

First, defendant, via counsel, argues that the prosecutor denied him a fair trial and committed misconduct by inviting the jury to consider the prior inconsistent statements of Louis and Samaniego as substantive evidence of guilt.

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Prosecutorial misconduct issues are decided on a case-by-case basis. *People v Kelly*, 231 Mich App 627, 637; 588 NW2d 480 (1998). The reviewing court must examine the pertinent portion of the record, and evaluate a prosecutor's remarks in context. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). "Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial." *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). Absent an objection at trial to the alleged misconduct, appellate review is foreclosed unless the defendant demonstrates the existence of plain error that affected his substantial rights. Reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). No error requiring reversal will be found if the prejudicial effect of the prosecutor's remarks could have been cured by a timely instruction. *People v Leshaj*, 249 Mich App 417, 419; 641 NW2d 872 (2002).

The prosecutor's closing argument referred to inconsistent statements made by Louis and Samaniego, and incorrectly relied on these statements as substantive evidence of defendant's guilt. However, this error did not seriously affect the fairness, integrity, or public reputation of the judicial proceedings. Nor did the error result in an actually innocent defendant's conviction and a curative instruction could have alleviated any prejudicial effect. *Leshaj*, 249 Mich App at 419. Evidence of the defendant's guilt was robust. Hicks identified defendant as the shooter. The jury was entitled to accept Hicks's testimony, notwithstanding Hicks's involvement in the incident. *People v Milstead*, 250 Mich App 391, 404; 648 NW2d 648 (2002). Other witnesses including Robinson, Samaniego and the child victim's father saw the defendant brandish a weapon and heard threats. Defendant has not established the existence of plain error warranting reversal. *Carines*, 460 Mich at 763-764.

Second, defendant, via counsel, argues that he was denied the right to present a defense, confront a witness against him, and a fair trial when the trial court refused to allow him to impeach Hicks on cross-examination as to pending firearms charges after Hicks stated that he waited to contact police because he could not get into trouble of that nature. We disagree.

We review for an abuse of discretion a trial court's decision to admit or exclude evidence. *People v Danto*, 294 Mich App 596, 598-599; 822 NW2d 600 (2011). "A trial court abuses its discretion when it selects an outcome that does not fall within the range of reasonable and

principled outcomes.” *People v Young*, 276 Mich App 446, 448; 740 NW2d 347 (2007). We review de novo an issue of constitutional law. *People v Benton*, 294 Mich App 191, 203; 817 NW2d 599 (2011).

The Confrontation Clause provides that in a criminal prosecution the accused has the right to be confronted with the witnesses against him. US Const, Am VI; *People v Fackelman*, 489 Mich 515, 524-525; 802 NW2d 552 (2011). The right of cross-examination is implicit in the constitutional right of confrontation. *Chambers v Mississippi*, 410 US 284, 295; 93 S Ct 1038; 35 LEd2d 297 (1973). “The Confrontation Clause guarantees only an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.” *United States v Owens*, 484 US 554, 559; 108 S Ct 838; 98 LEd2d 951 (1988) (internal quotation marks, quotations and citations omitted).

MRE 607 provides that “[t]he credibility of a witness may be attacked by any party, including the party calling the witness.” “As a general rule, however, a witness may not be contradicted regarding collateral, irrelevant, or immaterial matters.” *People v Vasher*, 449 Mich 494, 504; 537 NW2d 168 (1995). A witness’s credibility may be attacked by character evidence, but that evidence “may refer only to character for truthfulness or untruthfulness[.]” MRE 608(a).

The trial court correctly precluded defense counsel from impeaching Hicks with questions related to Hicks’s pending firearms charges. The Confrontation Clause still requires a defendant to limit cross-examination to that allowable under the rules of evidence. The trial court held that the statement by the witness that he did not report the incident to police right away was because “I can’t get into trouble like that and for me to get shot at, so—I was staying in the house” did not open the door for counsel to impeach the witness as to pending firearms charges. This statement, contrary to defendant’s assertion, does not indicate a statement by defendant that he has not or never committed a crime. It merely indicates a desire not to get in trouble for crimes or involved further in a shooting. Under MRE 608(b) evidence should only be admitted if it is probative to truthfulness or untruthfulness. The proposed evidence here is not probative for this purpose. The firearms charges against the witness were irrelevant and the trial court was within its discretion to deny defendant’s request to examine the witness on the issue. *Danto*, 294 Mich App at 598-599. Additionally the fact that he was charged with a crime for which he was not convicted is surely substantially more prejudicial than probative. MRE 403.

Finally, we have reviewed the issues raised by defendant in his Standard 4 brief. These issues are largely unpreserved and are all without merit. For that reason, we decline to discuss them further.

Affirmed.

/s/ Cynthia Diane Stephens
/s/ Henry William Saad
/s/ Mark T. Boonstra